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No. 84-1174

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

ESTHER C. MONZELLO,
Petitioner,

vs.

AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED*

Did the United States Court of Appeals for the Ninth Circuit properly conclude:

1. That the magistrate and the district court did not abuse their discretion in issuing the following orders directing petitioner to appear for her deposition and produce documents:

   a. Magistrate McMahon's order of February 10, 1983;

   b. Judge Rafeedie's order of March 18, 1983; and

   c. Judge Rafeedie's order of April 7, 1983.

2. That the district court did not abuse its discretion in dismissing petitioner's action for her wilful and repeated refusals to comply with the district court's discovery orders.

3. That Judge Hall did not abuse her discretion in denying petitioner's motion to disqualify Judge Rafeedie.

4. That petitioner's motions for an evidentiary hearing on allegations of falsification of the record by Judges Hall and Rafeedie should be denied.

PARTIES TO THE PROCEEDINGS

Petitioner Esther C. Monzello ("Monzello") and respondent Automobile Club of Southern California ("Automobile Club") are the only parties to these proceedings.

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*These questions have been restated from those set forth in the Petition.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The following opinions and judgments delivered by the lower courts are the only ones relevant to the present proceedings:

1. Order by Judge Hall denying petitioner's motion to disqualify Judge Rafeedie, dated January 3, 1983 (Appendix at A-13 to A-15);[1]

2. Order Re Discovery Matters by Magistrate McMahon, filed February 10, 1983 (Appendix at D-41 to D-48);

[1]All references are to the "Appendix to Petition for a Writ of Certiorari" filed by petitioner.

3. Memorandum Opinion and Order by Judge Rafeedie, entered March 18, 1983 (Appendix at D-48 to D-59);

4. Order by Judge Rafeedie, filed April 7, 1983;

5. Order Re Dismissal of Action and Award of Reasonable Attorney's Fees by Judge Rafeedie, entered May 31, 1983 (Appendix at A-9 to A-12); and

6. Memorandum Opinion by the United States Court of Appeals for the Ninth Circuit, filed August 8, 1984 (Appendix at A-24 to A-36).

RELEVANT STATUTES AND RULES

The following statutes and Federal Rules of Civil Procedure are the only ones relevant to these proceedings:

1. 28 U.S.C. § 455 (Appendix at D-131 to D-135);

2. Fed.R.Civ.P. 26(c);

3. Fed.R.Civ.P. 30(b)(1); and

4. Fed.R.Civ.P. 37(b).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (memorandum opinion by Judges Anderson, Tang and Ferguson) was rendered on review of an appeal from the district court's dismissal of Monzello's action pursuant to 28 U.S.C. § 1291. Monzello's petition is timely pursuant to 28 U.S.C. § 2101 and to the 30-day extension of time granted by Justice Rehnquist on October 23, 1984. As set forth in greater detail below, the Court of Appeals' decision was based upon established sanctions contained in Fed.R.Civ.P. 37(b) for a party's failure to cooperate in requested discovery and to comply with court-ordered discovery. As a result, the Court of Appeals'

decision does not present the special and important reasons which are normally required for this court to grant a writ of certiorari pursuant to U. S. Sup. Ct. Rule 17, 28 U.S.C.

STATEMENT OF THE CASE

After Monzello's charges of age discrimination had been dismissed for lack of merit by both the Equal Employment Opportunity Commission and the State of California Fair Employment and Housing Commission, she filed the present action on September 22, 1982, alleging she had been "constructively discharged" in violation of the Age Discrimination in Employment Act of 1967, as amended. 29 U.S.C. § 621 *et seq.* During the following eight months, Monzello knowingly and deliberately mocked the federal judicial process. She wilfully refused to appear for her deposition for more than six months and wilfully violated at least three court orders requiring her to appear for her deposition. She further exacerbated matters by purposefully and continuously engaging in abusive and profane conduct toward representatives of the Automobile Club and members of the federal judiciary. As a result of Monzello's bad faith conduct, the district court had no alternative but to dismiss her action.

It all began on October 14, 1982, when the Automobile Club noticed Monzello's deposition and a production of documents for November 2 and 3. Six days later, Monzello filed an "answer", rejecting these discovery requests as "premature". Monzello then refused to discuss the reasons for her refusal to appear either by telephone or at an Early Meeting of Counsel held November 1, pursuant to local district court rules ("local rules"). Instead, on November 1, Monzello filed a frivolous motion for a protective order. However, she failed to comply with the meet and confer provisions of the local rules, which subsequently caused her motion to be taken off calendar. During the

next two months, the Automobile Club was unsuccessful in its repeated attempts to have Monzello agree to a date for her deposition or to have Monzello cooperate in following the procedures set forth in the local rules for resolution of discovery disputes.

On December 3, 1982, Monzello filed a motion to disqualify Judge Rafeedie because of alleged bias. Her motion was premised upon a preposterous conspiracy called "the *FRENCH* Connection", supposedly evidenced by the fact that Rafeedie's confirmation as a district court judge had been sent to William French Smith as attorney general, who had previously served on the Automobile Club's board of directors in 1980. On January 3, 1983, Judge Hall denied Monzello's motion.[2]

On January 7, 1983, the Automobile Club moved for an order compelling Monzello to appear for her deposition, to produce documents and to pay sanctions pursuant to Fed.R. Civ.P. 37(d). Prior to the February 1 hearing on this motion, Monzello again engaged in wilful and bad faith conduct in an attempt to avoid having her deposition taken. First, on January 12, she threatened to seek a court order to end discovery immediately, even though none had been had. Two days later, she filed a pleading in which she unsuccessfully attempted to persuade the district court that the Automobile Club had not complied with the local rules in filing its motion. Finally, only a few days before the hearing, Monzello requested a seven-week continuance. Monzello claimed that she had insufficient time to respond to the motion even

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[2]*See* Appendix at D-146 to D-149 for the transcript of the January 3, 1983 hearing on Monzello's motion, and A-13 to A-15 for Judge Hall's order.

though she had been given more than the notice required under the local rules.[3]

At the February 1 hearing, Magistrate McMahon denied Monzello's request for a continuance. Monzello then refused to discuss the merits of the motion, claiming she was not prepared to do so. Magistrate McMahon, in an order filed February 10, ordered Monzello to appear for her deposition on March 8, to produce documents at that time and to pay $500 in sanctions.[4]

Even though Monzello claimed to be unprepared at the February 1 hearing, that very same day she filed a second motion for a protective order, which addressed the *same* issues raised by the Automobile Club in its motion. This conduct was further evidence of Monzello's bad faith.[5] Monzello asked that her deposition be cancelled or that the court require it to be taken in her home with the examination limited to one day for a total of seven hours. Monzello also filed a motion to appeal Magistrate McMahon's order. Both motions were consolidated and taken under submission without oral argument.

On March 7, 1983, the clerk to the district court orally notified the Automobile Club that both motions had been

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[3]By trying to continue the hearing from February 1 to March 22, Monzello undoubtedly thought that she could avoid having her deposition taken since the hearing would then have occurred only nine days prior to the district court's previously-established discovery cut-off date of April 1.

[4]The transcript of the February 1 hearing is set forth in the Appendix at D-1 to D-40, and the February 10 order is set forth in the Appendix at D-41 to D-48.

[5]In filing this motion, Monzello again failed to comply with the meet and confer provisions of the local rules, even though her earlier motion had been taken off calendar for that reason. Nonetheless, the district court considered her motion on the merits, giving Monzello every benefit of the doubt.

denied and that Monzello's deposition should go forward the next day as ordered. Both the clerk and the Automobile Club unsuccessfully attempted to notify Monzello of the order by telephone. When Monzello did not appear for her deposition on March 8, the Automobile Club sent telegrams to both of her residences of record, advising her that her motions had been denied and that she must appear for her deposition. Monzello neither appeared nor contacted the Automobile Club to arrange a mutually agreeable alternative date.

The district court's written order denying Monzello's motions was not entered until March 18.[6] Accordingly, the Automobile Club filed an ex parte motion requesting new court-ordered deposition dates. At the direction of the district court, the Automobile Club submitted a proposed order, setting Monzello's deposition for April 19 and 20. A copy of this proposed order was served by mail upon Monzello.[7] This order, which was signed by Judge Rafeedie on April 7, advised Monzello, as had the previous February 10 and March 18 orders, that her failure to comply with the order could result in the dismissal of her action.

At the district court's instructions, the Automobile Club mailed two copies of the April 7 order to Monzello, one by express mail and one by certified mail. These orders were all returned by the Post Office as "unclaimed." (Note: At the May 23, 1983 hearing on the Automobile Club's motion to dismiss, Monzello contended that she was not required to appear for her April 19 deposition because she had never received the court's order. Significantly, Monzello did not claim that she was ignorant of the court's order or unaware of the several attempts by the Post Office to deliver the

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[6]Judge Rafeedie's Memorandum Opinion and Order is set forth in the Appendix at D-48 to D-59.

[7]This proposed order was never returned to counsel for the Automobile Club and must have been received by Monzello.

notices. Instead, Monzello simply claimed that she did not have to accept service of the order because "the defendant is not the Court.")

When Monzello failed to appear for her deposition on April 19, counsel for the Automobile Club telephoned Monzello's residence. A woman, whose voice counsel recognized as that of Monzello, answered the telephone, and the following conservation occurred:

MR. ZAPP: "Mrs. Monzello?"

MRS. MONZELLO: "Who is calling?"

MR. ZAPP: "This is Jim Zapp calling."

MRS. MONZELLO: "You have the wrong number."

Monzello abruptly hung up the telephone and refused to answer the telephone when counsel for the Automobile Club again telephoned her residence twice within the next four minutes, permitting the telephone to ring approximately twelve times on each occasion.

Monzello and her husband engaged in other wilful misconduct during the course of her action even beyond the foregoing refusals to comply with court orders. They harassed Automobile Club management employees and their families, sent correspondence containing offensive and profane remarks to management representatives and counsel for the Automobile Club and made denigrating remarks about the district court. The most graphic example of such conduct was the memorandum Monzello filed in opposition to the Automobile Club's motion to dismiss her action. In this pleading, Monzello made insulting and profane remarks about counsel for the Automobile Club, Judge Rafeedie and Attorney General Smith. Specifically, she referred to Judge Rafeedie as "an intellectual midget", a "Prince of Clowns", and "a mountain of physical blubber". Finally, she stated

"[T]he Federal Judicial System is based on *legalized anarchy.*" (Emphasis in original.)

At the May 23 hearing regarding the Automobile Club's motion to dismiss her action, Monzello admitted that she and her husband had written the above-referenced profanity and that she had refused to accept service on the copies of the orders mailed by the Automobile Club at the court's request. Based upon her repeated and wilful refusals to comply with the local rules, the Federal Rules of Civil Procedure and several court orders, the district court imposed an additional $500 in sanctions and dismissed the action. Even then, the district court gave Monzello a grace period of more than 30 days, until June 30, 1983, within which she could have her action reinstated by paying the $1000 in sanctions and by agreeing to have her deposition taken without any conditions precedent.[8] Instead, Monzello chose to appeal the dismissal of her action.

During her appeal, Monzello continued to engage in similar bad faith conduct. She filed motions accusing Judge Hall, Magistrate McMahon and Judge Rafeedie of deliberately and purposely falsifying the transcripts of the January 3, February 1, and May 23 hearings, respectively. When the district court denied her motions, she refiled the same motions in the Court of Appeals, requesting an evidentiary hearing on these alleged deliberate falsifications of the record. These motions were supported only by her conclusory statements that these transcripts did not state or show what had occurred and what was said. She failed to produce any evidence whatsoever as to how the records had supposedly been altered or falsified. The Court of Appeals affirmed the dismissal of the action and denied Monzello's motions, finding her conclusory statements insufficient to support an order for an evidentiary hearing.

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[8]The transcript of the May 23 hearing is set forth in the Appendix at D-60 to D-90, and the order of dismissal is set forth at A-9 to A-12.

ARGUMENT

I

THIS CASE PRESENTS NONE OF THE SPECIAL OR IMPORTANT REASONS FOR WHICH A WRIT OF CERTIORARI IS GENERALLY GRANTED

A. The Discovery Orders and Dismissal of Monzello's Action

This case presents none of the special or important reasons for which a writ of certiorari will be granted. *See* U. S. Sup. Ct. Rule 17, 28 U.S.C. It is settled law that dismissal is proper when a party wilfully refuses to comply with legiitimate court-ordered discovery. In *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, *reh'g denied*, 429 U.S. 874 (1976), this Court expressly authorized the use of the ultimate sanction of dismissal under Fed.R.Civ.P. 37(b) when litigants have refused to comply with court-ordered discovery. This Court reasoned as follows:

> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. 427 U.S. at 643.

This Court went on to state that even if a particular litigant might comply with future discovery orders, dismissal was still proper under Rule 37 to prevent parties in other actions from wilfully disobeying district court discovery orders.

Further, this Court clearly has prohibited appellate courts from interfering with a district court order issued pursuant to Fed.R.Civ.P. 37(b) unless the district court has

abused its discretion. In *National Hockey League,* this Court stated:

> The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing. *Id* at 642.

The decision rendered by the Ninth Circuit in the present case is entirely consistent with *National Hockey League* and with the decisions of other federal Courts of Appeals under Fed.R.Civ.P. 37(b). Indeed, the Second, Fifth, Eighth, and Ninth Circuits have each affirmed lower court dismissals for a party's refusal to comply with court-ordered discovery. *See Anderson v. Home Insurance Co.,* 724 F.2d 82, 84 (8th Cir. 1983) (dismissal of pro se action for repeated failure to answer interrogatories was not an abuse of discretion); *Wyle v. R. J. Reynolds Industries, Inc.,* 709 F.2d 585, 589-91 (9th Cir. 1983) (dismissal of action affirmed for plaintiff's failure to comply with court-ordered discovery); *Anderson v. Air West, Inc.,* 542 F.2d 1090 (9th Cir. 1976) (dismissal of action proper because of wilful failure to appear for court-ordered depositions); *United States Freight Co. v. Penn Central Transportation Co.,* 716 F.2d 954 (2d Cir. 1983) (default judgment properly entered for defendant's wilful failure to comply with discovery order); *Vela v. Western Electric Co.,* 709 F.2d 375 (5th Cir. 1983) (dismissal of action not an abuse of discretion where plaintiffs repeatedly failed to comply with the court-ordered discovery); *Bonaventure v. Butler,* 593 F.2d 625 (5th Cir. 1979) (dismissal of action affirmed in light of plaintiff's repeated and deliberate refusals to appear for deposition).

In summary, this case presents neither an important nor an unresolved question of federal law, nor does it present a question upon which the federal Courts of Appeals have

ruled inconsistently. Rather, the Ninth Circuit applied the proper standard — abuse of discretion — and properly concluded that the district court had acted within its discretion in dismissing Monzello's action for her repeated and wilful refusals to comply with court-ordered discovery.

B. The Denial of Monzello's Motion to Disqualify Judge Rafeedie

The law is equally clear with respect to the role of a Court of Appeals in reviewing an order on a motion to disqualify a district court judge. There is no disagreement among the several Courts of Appeals that the applicable standard of review is whether the district court abused its discretion. *See e.g., Johnson v. Trueblood,* 629 F.2d 287 (3d Cir. 1980), *cert. denied,* 450 U.S. 999 (1981) (review of district court's action on refusal is by abuse of discretion standard); *In Re Federal Skywalk Cases,* 680 F.2d 1175 (8th Cir.), *cert. denied.* 459 U.S. 988 (1982) (role of Court of Appeals on review of motion to disqualify a judge is limited to deciding whether the district court's evaluation of the claim of prejudice was an abuse of discretion); *Phillips v. Joint Legislative Committee on Performance & Expenditure Review,* 637 F.2d 1014 (5th Cir. 1981), *cert. denied,* 456 U.S. 960 (1982), *reh'g denied,* 457 U.S. 1140 (1982), *cert. denied,* 456 U.S. 971 (1982), *reh'g denied,* 458 U.S. 1116 (1982); *Blizard v. Frechette,* 601 F.2d 1217 (1st Cir. 1979).

Further, it is established law that the moving party has the burden to allege *facts* from which a reasonable person would fairly infer that a judge is personally and extrajudicially biased and prejudiced. *See United States v. Carignan,* 600 F.2d 762, 763 (9th Cir. 1979); *Wood v. McEwen,* 644 F.2d 797 (9th Cir. 1981), *cert. denied.* 455 U.S. 942 (1982).

II

THE NINTH CIRCUIT PROPERLY APPLIED THE FOREGOING LEGAL PRINCIPLES TO THE FACTS OF THIS CASE

A. The Discovery Orders and the Dismissal of the Action

Monzello's Petition for a Writ of Certiorari is but a mild sampling of the type of conduct to which the Automobile Club and the lower courts have been subjected during the prosecution of this action. The transcripts of the hearings held before the district court illustrate Monzello's hostile and obstructive conduct. The record evidence of Monzello's deliberate disobedience of court orders is unequivocal. For more than six months Monzello refused to establish a mutually agreeable date upon which her deposition could be taken. She wilfully refused to comply with three different court orders concerning her deposition. Indeed, she even attempted to avoid service of the April 7 court order so she could claim that such order was ineffective.[9]

Finally, Monzello's refusal to talk to counsel for the Automobile Club on the last court-ordered deposition date, April 19, and her conduct at the May 23 hearing make it clear that Monzello never gave any indication to the district court that she would comply with any future discovery orders. Accordingly, dismissal of her action was the only alternative available to the district court. Moreover, dismissal was necessary to deter parties in other law-

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[9]Service by mail is complete upon mailing. Fed.R.Civ.P. 5(b). Non-receipt of such mail does not vitiate service. *Rifkin v. United States Lines*, 24 F.R.D. 122, 123 (S.D.N.Y. 1959). Indeed, the Fifth Circuit affirmed dismissal of an action with prejudice under virtually identical circumstances in *Anthony v. Marion County General Hospital*, 617 F.2d 1164 (5th Cir. 1980), where the plaintiff, like Monzello, purposely avoided delivery of notices sent by certified mail, causing the documents to be returned as "unclaimed".

suits from similarly disobeying discovery orders of district courts. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, *reh'g denied*, 429 U.S. 874 (1976).

B. The Denial of Monzello's Motion to Disqualify Judge Rafeedie

The Ninth Circuit properly determined that Monzello did not meet her burden to support disqualification by merely making conclusory allegations of Judge Rafeedie's alleged bias. *See Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982). The Ninth Circuit also properly concluded that Monzello's attempt to present *new* evidence in support of her allegations, namely a newspaper article wherein Judge Rafeedie made generalized comments concerning employment-related lawsuits, was not properly before the court on appeal. *See G-K Properties v. Redevelopment Agency*, 577 F.2d 645, 648 (9th Cir. 1978).

Even if the article was considered, it is well settled among the circuits that general statements made by a judge do not constitute the showing of personal bias against a specific party like Monzello, which is necessary for disqualification. Such was the Ninth Circuit's ruling in the present case. *See Wood v. McEwen*, 644 F.2d at 802; *Rosquist v. Soo L. Railroad*, 692 F.2d 1107 (7th Cir. 1982) (district judge's expression of views on general subject of attorneys does not require disqualification from deciding such issue); *United States v. Norton*, 700 F.2d 1072 (6th Cir.), *cert. denied*, 461 U.S. 910 (1983) (general statements by district judge concerning prevailing societal attitudes toward controversial groups with which defendants were affiliated was insufficient to require refusal since the challenged remarks were not directed at the defendants themselves).

C. The Denial of Monzello's Motions for an Evidentiary Hearing on Alleged Falsifications of the Record in the District Court

The Ninth Circuit properly denied Monzello's request for an evidentiary hearing concerning alleged falsifications of the reporter's transcripts for the January 3, 1983, February 1, 1983 and May 23, 1983 hearings, respectively. Each of these transcripts was reviewed by the district court pursuant to Fed.R.App.P. 10(e). In each case the district court found the record to be accurate and Monzello's motion to be without merit.[10] The recollection of the district court as to the accuracy of the reporter's transcript is conclusive. *See United States v. Mori,* 444 F.2d 240 (5th Cir.), *cert. denied,* 404 U.S. 913 (1971). Moreover, Fed.R.App.P. 10(e) does not authorize adding to the record statements which were never made or events which never occurred. *See Shew v. Brownell,* 219 F.2d 301 (9th Cir. 1955).

The foregoing aside, the burden is on the moving party to present substantial evidence before an evidentiary hearing will be granted concerning such charges. In *Moder v. United States,* 62 F.2d 462 (D.C. Cir. 1932), *cert. denied,* 288 U.S. 599 (1933), the Court of Appeals for the District of Columbia discussed the necessary quantum of proof:

> It is hardly conceivable that a more serious charge than [deliberate and intentional falsification of the record on appeal] could be made against a judge or an attorney, and to justify it the proof should be *unquestionable.* 62 F.2d at 463. (Emphasis added.)

Monzello failed to submit any evidence warranting an evidentiary hearing. She simply proffered self-serving statements that the record of each proceeding did not state or show what actually occurred or what was said. Her affi-

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[10] *See* Appendix at A-19 to A-23.

davit filed in support of her motions did not present any factual evidence as the manner by which the record had supposedly been falsified. Accordingly, the Court of Appeals' denial of her motions was entirely appropriate.

D. Monzello Was Not Improperly Denied a Jury Trial

The Ninth Circuit properly rejected Monzello's contention that the district court was without the authority to dismiss her action because it denied her right to a jury trial. The fact that a party may otherwise be entitled to a jury trial does not preclude dismissal of the complaint at a pre-trial stage. Indeed, it has been specifically held that a Rule 37 dismissal does not violate the right to a jury trial where a party fails to comply with court-ordered discovery. *See Wyle v. R. J. Reynolds Industries, Inc.*, 709 F.2d 585, 592 (9th Cir. 1983); *McMullen v. Travelers Insurance Co.*, 278 F.2d 834, 835 (9th Cir.) (per curiam), *cert. denied*, 364 U.S. 867 (1960).

III

CONCLUSION

The Petition for a Writ of Certiorari should be denied. The questions presented by this case do not warrant Supreme Court review. The applicable law is well settled, and the lower courts properly applied the law to the facts of this case. The district court did not abuse its discretion in issuing the referenced discovery orders or in dismissing Monzello's action when she wilfully and consistently disobeyed these orders. Monzello's flagrant contempt for the judicial process should not be rewarded.

DATED: February 14, 1985

Respectfully submitted,

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Attorneys for Respondent